



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 50 OF 2002

NATIONWIDE ELECTRICAL INDUSTRIES LTD. APPELLANT

AND

PRIME CAPITAL & CREDIT LTD. RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Milimani Commercial Courts,

Nairobi (Onyango Otieno J) dated 27th April, 2001

in

H.C.C.C. NO. 534 OF 1998)

JUDGMENT OF GITHINJI, J.A.

I have had the privilege of reading in draft the judgment of O’Kubasu, JA whereby his Lordship found that Shs.10,000,000/= being part of the respondent’s claim was paid and thus partially allowed the appeal.

My respectful view however, is that the appeal should be dismissed in its entirety.

The respondent’s suit against the appellant was based on the dishonour of four promissory notes of Shs.5,000,000/= each (total Shs.20,000,000/=). The four promissory notes were made by the appellant and were payable to Shah Motors Limited, which company in turn endorsed them in favour of the appellant and which the appellant later discounted by paying Shah Motors Limited Shs.18,460,000/= being their value, less the discount. However, when the respondent presented them for payment on their due dates, the four promissory notes were dishonoured by non-payment.

The respondent duly gave notice of dishonour of the promissory notes to the appellant as the drawer apparently pursuant to **Section 48** of the *Bills of Exchange Act* (Act). To secure the payment of each of the four promissory notes, the respondent had issued four post – dated corresponding cheques for a total of Shs.20,000,000/= to mature on the respective dates of the four promissory notes. The cheques, like the promissory notes, were dishonoured on presentation for payment on their respective due dates. Although Surendra Lalji Ladha Shah (DW2) denied that the appellant issued the cheques there was incontestable evidence that the appellant indeed issued the four cheques.

Thereafter, the respondent demanded payment of the value of the four promissory notes plus interest and on 2nd July, 1997 the appellant wrote to the respondent in answer to the demand partly as follows:

“RE: UNPAID BILLS AMOUNTING TO KSHS. 20 MILLION:

With reference to our meeting in your office on 25th of June, 1997 between yourself and the undersigned, we agree to discharge our liability in respect of four unpaid promissory notes in all amounting to Kshs.20 million made payable to Shah Motors Limited and discounted by Nationwide Electrical Industries Limited within the period of twelve months, that is to say on or before 30th June, 1998.

Initially for a period of three months, commencing from 1st July, 1997 we shall pay Kshs.250,000.00 (Kenya shillings two hundred and fifty thousand only) every month and thereafter on the 1st day of each succeeding month. After three months, we shall, with your consent review the repayment programme”.

The respondent however raised issue with one promissory note of Shs.5,000,000/= intimating that it had been paid and that it would supply proof of payment.

The respondent replied by a letter dated 9th July, 1997 denying that one promissory bill was paid. The appellant again replied by a letter dated 19th August, 1997 saying in part:

“Thank you for your letter reference 193/1/97 dated 9th July, 1997. We confirm that we shall discharge our liability as set out in paragraphs two of our letter dated 2nd July, 1997”.

The appellant however, raised questions about the explanation given in respect of the non-payment for one promissory note. Thereafter, appellant paid a total of Shs.1,750,000/= by instalments between July, 1997 and December, 1997 after which, it stopped further payment. By a letter dated 5th May, 1998 the respondent ultimately threatened to institute winding up proceedings of the appellant unless the outstanding amount was paid.

By a letter dated 27th May, 1998, the appellants then advocates M/s. Kaplan & Stratton informed the respondents that the four promissory notes were not enforceable as “*Shah Motors Ltd. gave no consideration whatever for the issue of the promissory notes by our client*”.

When the suit was ultimately filed, the appellant raised a defence of lack of consideration for the four promissory notes, among other defences. The superior court was addressed at length by respective counsel on the issue of consideration for the promissory notes. The superior court (Onyango Otieno, J. – as he then was) considered the issue and held in part:

“Further, I do agree that the defence of lack of consideration even if it were to be valid against Shah Motors it cannot stand against the plaintiff, as in my view, considering the evidence before me, the plaintiff was a holder of the subject promissory notes before they became due. It took them in good faith and gave value thereof. I do find that the defence of lack of consideration cannot stand in this case as I find that the plaintiff was the holder of the same four promissory notes”.

It is contended in this appeal that the superior court erred in so finding. It is convenient that I should deal with the issue of consideration for the four promissory notes at the outset.

It is clear from **Section 30** of the *Bills of Exchange Act* (which also applies to promissory notes by virtue of **Section 90 (1)**), that, unlike in ordinary contracts, consideration is presumed in case of contracts on bills or promissory notes till the contrary is shown, (see ***Nanalal Vrajdas vs. Chunilal Dhanji Mehta*** [1946] 13 EACA 58). That section provides:

“30. (1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill”.

By **Section 29** of the same Act, “a holder in due course” is a person who takes a bill complete and regular on the face of it, in good faith and for value before it was overdue.

It follows that by **Section 30 (2)** of the Act, a holder of a bill or promissory note is deemed to have taken the bill in good faith and to have given consideration for it and the onus is on the defendant to show circumstances, such as duress, which disentitle the plaintiff to a judgment to which otherwise he would be entitled.

In ***Hassanali & Co. vs. Jeraf Produce Store*** [1967] EA 555 the predecessor of this Court held in respect of **Section 30** of the *Bills of Exchange Act* (Tanzania) which is identical to the Kenya Act, that:

“a holder of a bill (includes a cheque) is prima facie a holder in due course, but, if it is admitted or raised in the defence and proved that the issue of the bill is affected with fraud, duress force and fear or illegality, the burden of proof shifts back on to the holder”.

Again in ***Sirley vs. Tanganyika Tegry Plastics Ltd*** [1968] EA 529, the predecessor of this Court in construing the Bill of Exchange (Tanzania) held, among other things, that a total failure of consideration for a note is a defence against a claim on a note made by an immediate party, but it is not a defence against a holder in due course, that is a person who took the note in good faith for value and who at the time the note was negotiated to him had no notice of any defect in the title of the person who negotiated it.

In this case, the appellant admitted that it issued the four promissory notes to Shah Motors Ltd and that the notes were negotiated to the respondent who discounted the promissory notes. The appellant did not plead or allege any duress, fraud, illegality etc against Suresh Shah, a director of Shah Motors Ltd. who handled the transaction and who incidentally, was also a director of the appellant. The claim by the appellant that four promissory notes were issued to Shah Motors Ltd. for purchase and delivery of transport vehicles to the appellant for a project in Tanzania is no valid defence to the respondent’s suit based on the promissory notes. By **Section 30 (1)** of the Act, Shah Motors Ltd. as a party in the promissory notes is deemed to have become a party thereto for value. Indeed, the words “for value received” are printed on each of the four promissory notes.

In my respectful view, the trial Judge stated the law regarding consideration for promissory notes correctly.

Although the appellant did not plead the defence of discharge of the four promissory notes by payment, the appellant did in fact call a witness at the trial, Justus Nungi Kamau (DW1) who testified that he was at the material time in charge of current accounts at the Bank of Baroda and that two cheques each for Shs.5,000,000/= drawn by Shah Motors Ltd. in favour of Prime Capital & Credit Ltd (respondent) were paid and credited into the respondent’s account at the bank. That evidence came as a surprise to the respondent, and, with the permission of the court, the respondent recalled Ananthwarayan Ranganathan (PW1), its sole witness to testify on the issue of the two cheques. PW1 on being re-called denied that the two cheques were paid in satisfaction of the four promissory notes. He testified that the cheques were paid against a separate outstanding debt of Shs.10,000,000/= in the account of Shah Motors Ltd. prior to the discounting of the four promissory bills in issue.

The judgment of the superior court shows that the court was fully addressed on the new defence raised

which became the main defence and the court quite properly, in my view, considered that defence.

The superior court exhaustively considered the defence of discharge and ultimately rejected it saying:

“It is clear to me that the defendant, in finding those two cheques believed they were for payment of promissory notes, but on proper consideration, there is no proper evidence upon which a court of law can make a finding that these two cheques were used for the payment of the promissory notes, the subject of this matter. and I do accept that there was an outstanding Kshs.10,000,000 which was to be paid by two cheques and which outstanding was not part of the proceeds of the promissory notes”.

The superior court after evaluating the respondent’s case, found Ananthwarayan Ranganathan to be a candid witness for the court said:

“On my own assessment and consideration of the evidence before me, I am satisfied that the plaintiff has not concealed to the court relevant matters on this case ...”.

It is trite law that the Court of Appeal will interfere with a finding of fact by the High Court only where, *inter alia*, the finding is based on no evidence or on a misapprehension of evidence or the Judge is shown to have acted on wrong principles in reaching the decision and further that the appellate court would not interfere with those findings by the lower court which were based on the credibility of witnesses unless no reasonable tribunal would make such findings or it was shown that there existed errors of law (see Mwanasokoni vs. Kenya Bus Services Ltd. [1985] KLR 359, Republic vs. Oyier [1985] KLR 353; Ogol vs. Muriithi [1985] KLR 359..

The appellants complaints, *inter alia*, that the superior court erred in law in holding as a fact that the promissory notes had not been discharged and misdirected itself in law in holding that the two cheques for a total of Shs.10,000,000/= were paid in satisfaction of other accounts.

These are general complaints. The appellant’s counsel did not show where the superior court erred in the evaluation of the evidence. It is clear from the judgment that the superior court considered in detail all the evidence regarding the defence of discharge of the promissory notes by payment and rejected the defence with reasons. It has not been shown that the superior court failed to consider any relevant matters or that it considered irrelevant matters or that no reasonable tribunal could have reached such a decision. In my humble view, there are no grounds on which this Court can interfere with the findings of fact and the decision of the superior court on the defence of discharge by payment.

The evidence shows that the appellant, consciously and unequivocally admitted total indebtedness and offered to pay the debt by instalments. A substantial sum (Shs.1,750,000/=) was indeed paid by instalments over a period of six months. The admission of the debt was made by Surendra Lalji Ladha Shah, a shareholder and Managing Director of the appellant – a Senior Officer of the appellant. The reasons he gave in his evidence for admission of the debt, that is, to buy time as Suresh Shah, a director of appellant have gone underground and was being sought by the police and Central Bank cannot in law vitiate the admission of liability..

On my part, I would for the reasons stated dismiss the appeal in its entirety with costs to the respondent.

Dated and delivered at Nairobi this 9th day of October, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL